

REMARKS

The Office Action of January 4, 2007 has been reviewed and the comments therein were carefully considered. Claims 185-212 are pending in this application. By this response, claims 185, 206-209 and 212 have been amended. The amendments are supported by the application as originally filed and no new subject matter has been added.

Rejections under 35 U.S.C. § 103

The Office Action of January 4, 2007 (“Office Action”) rejected pending claims 185-212 as being unpatentable over Auzerie (FR 2770778 A1) (“Auzerie”) in view of U.S. Patent No. 5,968,544 issued to Howard et al. (“Howard”) and U.S. Patent No. 5,681,569 issued to Kuznicki et al. (“Kuznicki”). The Office Action also rejected Claim 210 in view of the above references and further in view of U.S. Patent No. 6,730,337 issued to Hutt et al. (“Hutt”).

1. Rejection by Auzerie in View of Howard and Kuznicki

The Office Action alleges that the Auzerie reference discloses a rehydration solution composition as in Claim 185. The Office Action notes, however, that “Claim 185 differs from the reference in the use of 3 types of carbohydrates.” See page 2. The documents cited in the Office Action do not disclose the limitations of the present claims. Furthermore, the Office Action does not state any motivation or suggestion to combine any of the documents to arrive at the invention in the currently amended claims.

Howard teaches away from using the claimed compositions. As Howard discloses in Example 1, 11.1 grams of carbohydrates are provided in 63 grams of the mixture, or close to 20%. The claimed compositions, however, specifically call for from about 4 to about 10% by weight of a carbohydrate sources. Thus, Howard yields twice the carbohydrates as contemplated for use in the present invention. The same applies for Claims 186 and 187, as they depend from Claim 185. Moreover, Howard teaches compositions that include creatine. There is no evidence that including creatine in the mix will result in the desired behavior of the claimed compositions.

The documents cited in the Office Action also do not disclose the carbohydrate source as being a mixture of at least three components, as required by amended claim 185. In addition, none of the cited documents teach or suggest that “the amount of fructose is less than the total

amount of glucose from all sources of carbohydrates." See, also Application, pages 21-22. Moreover, none of the documents disclose a carbohydrate source within a beverage composition that has the characteristic of 80% fluid retention. Furthermore, there is no disclosure, suggestion or motivation provided to expect that the carbohydrate sources of Howard and Kuznicki utilized within a beverage composition would result in having no negative sensory attributes.

The Office Action also states that Claims 196-198 call for particular amounts of electrolytes. The Office Action states that "the amounts of the references are within or near the claimed amounts," and that those within the skill of the ordinary worker would be able to "vary the amounts of electrolytes to achieve the required osmolality." See Page 3. Applicants respectfully disagree with the conclusions set forth in the Office Action.

Indeed, the ranges claimed by Applicants are not the same as those disclosed in the documents cited in the Office Action. For example, Auzerie does not disclose the ranges of chloride or sodium as contemplated in the claims. There is no disclosure, suggestion or motivation to adjust the amount of chloride or sodium in Auzerie in order to reach the osmolality claimed in Claim 185. Furthermore, there is absolutely no disclosure, suggestion or motivation that utilizing ranges of chloride and sodium outside of that of Auzerie would yield an osmolality as set forth in Claim 185.

As explained in the translated abstract, the compositions disclosed in Auzerie show "synergistic activity" which Auzerie considers its novel feature. Indeed, the title of Auzerie also states that the synergy is a very important part of that invention. One skilled in the art would not modify the teachings of Auzerie as the Office Action states because such modifications would be contrary to obtaining the composition necessary to obtain the desired synergistic effects taught by Auzerie. Indeed, Auzerie specifically requires this "synergy" with the combination of elements to display the "synergistic activity."

Neither Howard nor Kuznicki teach any variation of components to have the results expected from the instant claims. Nor do Howard or Kuznicki suggest or provide motivation to vary the components of the invention and utilize ranges outside of the claimed references in order to attain any "synergistic effects," including the claimed fluid retention or negative sensory attribute. Auzerie does not discuss these physical attributes, or how missing any one of the

ingredients may affect the attributes of osmolality, fluid retention and lacking negative sensory attributes.

Howard is also not even relevant to the present invention. Howard does not disclose any mixtures of carbohydrates, in accordance with compositions of the claimed invention. Those of ordinary skill in the art would not think to combine the teachings of Auzerie and Howard: first and foremost because of the synergy described in Auzerie, and secondly, because Howard is particularly directed to compositions including creatine which is not present in Auzerie. For at least these reasons, the teachings of Howard are inapplicable for combination with Auzerie and would not be combined by those of ordinary skill to arrive at the instant claims.

Moreover, Kuznicki does not disclose, teach or suggest the combination set forth in the Office Action. Kuznicki suggests the use of fructose and glucose as a carbohydrate source. In the alternative, Kuznicki discloses utilizing sucrose as a carbohydrate source. However, Kuznicki does not suggest or teach utilizing three different carbohydrate sources at the same time. Indeed, there are no examples in Kuznicki of using three carbohydrate sources or even of using two carbohydrate sources together. Thus one of ordinary skill in the art would not contemplate the use of three carbohydrate sources based on Kuznicki absent the inappropriate application of hindsight.

With respect to Claims 199-208, the Office Action states that using various amounts of calcium and magnesium in a beverage is well known. The Office Action argues that adjusting the amount of minerals and electrolytes is further well known in order to correct the osmolality. The present claims, however, utilize a specific combination of electrolytes (specifically, sodium and chloride) to not only account for the osmolality, but at the same time provide a fluid retention that is specified in independent Claim 185. The documents cited, in particular Auzerie, requires the synergistic effect of a specific combination of elements and is silent regarding osmolality and fluid retention. The Office Action simply ignores the claimed fluid retention limitation and none of the documents show that this characteristic of fluid retention would be present.

Furthermore, the Office Action stated that Claims 206-207 do not require any amount of a flavoring agent. Those claims have been amended. With respect to Claims 206-209, the

Office Action states that the use of any clouding agents or flavoring agents would be within the purview of those of ordinary skill in the art. The Office Action, however, makes no reference to flavoring agents or clouding agents within the disclosure of the Auzerie reference. As stated, Auzerie teaches the concept of “synergy” and how the “synergistic effects” of a specific combination of elements. Because of this teaching of synergy, one skilled in the art would not have been motivated to modify Auzerie as such modification could upset the synergistic requirement. There is simply no disclosure, suggestion or motivation to add a clouding agent or flavoring agent.

The Office Action also rejected Claim 211 as being directed to a concentrate. The Office Action states that “it would have been obvious to make a concentrate especially since no amount of water is cited in the abstract of Auzerie.” See page 4. Applicants respectfully disagree. Reducing the amount of water (or not having any water at all), would certainly effect the overall attributes of the beverage composition, including the fluid retention and the sensory attributes.

The Office Action states that the references disclose the various amounts of ingredients called for by the claim. The Office Action argues that “[i]t appears that the precise ingredients as well as their proportions affect the osmolality of the product, and thus are result effective variables, which one of ordinary skill in the art would routinely optimize.” See page 5. Applicants respectfully disagree with the conclusions set forth in the Office Action. Applicants have found that the specific combination of ingredients at the specific proportion yield the inventive composition displaying desired characteristics. Indeed, Auzerie itself discloses that its specific combination has synergistic effects which allows for the novelty and usefulness of that invention. Those of ordinary skill in the art would not be motivated to combine the references in a manner which is contrary to Auzerie and its disclosure of synergistic effects of specific combinations of elements.

None of the references cited in the Office Action, either by themselves or as part of a combination, disclose, suggest or provide any motivation to use the specific ranges of ingredients found in Claim 212 in order to achieve the limitations described above. As such, Applicants respectfully request the rejection of Claim 212 be removed and the claim be allowed as written.

2. Rejection by Auzerie in View of Howard and Kuznicki Further in View of Hutt

The Office Action further states that "it would have been obvious to use known ingredients such as citric acid for its known function of adding acidity in the composition of the combined references." See page 5. Claim 210 is dependent on Claim 199, which depends from Claim 185. As previously stated, there is no disclosure, motivation or suggestion in Auzerie to add elements for any reason. Indeed, Auzerie focuses on the "synergistic effects" of the specific combinations of elements disclosed, none of which include the specific range of citric acid claimed.

Indeed, Hutt, nor any other document, discloses the specific range of citric acid for use in beverage compositions. As such, one skilled in the art would not have expected any of the compositions of the documents to yield the instant claimed compositions.

For at least these reasons, the references cited in the Office Action fail to disclose, suggest or provide motivation to arrive at the claimed limitations. Applicants respectfully request that the rejection be removed and the claims be allowed as written.

CONCLUSION

All rejections having been addressed, applicant respectfully submits that the instant application is in condition for allowance, and respectfully solicits prompt notification of the same. Should the Examiner have any questions, the Examiner is invited to contact the undersigned at the number set forth below.

Respectfully submitted,

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By: /Anuj K. Wadhwa/
Anuj Wadhwa
Registration No. 50407
BANNER & WITCOFF, LTD.
Ten S. Wacker Drive
Suite 3000
Chicago, IL 60606-7407
Telephone: 312-463-5000
Facsimile: 312-463-5001